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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

Nos. 1688, 1689

OXFORD CONSUMER DISCOUNT COMPANY OF NORTH PHILADELPHIA,

Appellant,

v.

ANTHONY E. STEFANELLI, *et al.*,

Appellees.

FIRST MERCANTILE CONSUMER DISCOUNT COMPANY,

Appellant,

v.

ANTHONY E. STEFANELLI, *et al.*,

Appellees;

and

PAUL V. DURKIN, *et al.*,

Appellees,

and

GEORGE F. KUGLER, JR.,
Attorney General of New Jersey,

Appellee.

On Appeal from the Supreme Court of New Jersey

JOINT MOTION TO DISMISS APPEAL ON BEHALF OF APPELLEES, ANTHONY T. STEFANELLI AND THERESA STEFANELLI, PAUL V. DURKIN AND ELLEN DURKIN

Motion to Dismiss Appeal

The appellees move the Court to dismiss the appeals herein, or in the alternative to affirm the judgment of the Supreme Court of New Jersey, on the grounds that:

1. The appeals are premature in that the judgment of the Supreme Court of New Jersey is not a final judgment.
2. The appeals do not present any substantial federal question.

I. The State Statute Involved and the Nature of the Case

A. *The Statute*

The New Jersey Secondary Loan Act of 1965, N.J.S.A. 17:11A-1 through N.J.S.A. 17:11A-33, was a legislative response to a report of the Secretary Director of the New Jersey Real Estate Commission detailing certain abusive lending practices of New Jersey and Pennsylvania lenders acting in concert to the detriment of New Jersey residents. These practices included, among others, false and misleading advertising and exorbitant interest and charges. (Brief of the Attorney General of New Jersey in the Superior Court of New Jersey, Appellate Division, AG1a, paragraphs 4 and 5.)

The report stated in part:

> "Our review showed that, in most cases, the New Jersey second mortgage operator would contact or

be contacted by a financial outlet, usually in the Philadelphia area, where money was available for second mortgages if a specific procedure was followed. After the second mortgage operator was advised how to conduct his business, he generally began to advertise debt consolidation plans offering 'easy' repayment terms . . ." (Brief of the Attorney General in the Superior Court of New Jersey, Appellate Division, AG2a, paragraph 4)

"For the sake of this report, we will take, step by step, the course of a typical case of Mr. Jones. In his effort to obtain $3000 to pay off existing debts, Mr. Jones has been attracted by the 'Smith Second Mortgage Brokerage Company' advertisement. He then makes contact by telephone, and an appointment is arranged for a representative of the 'Smith Company' to come to his home. (Brief of the Attorney General in the Superior Court of New Jersey, Appellate Division, AG3a, paragraph 1)

"The first step of the 'Smith Company' is to have Mr. Jones complete a detailed application . . . After the application has been completed, a picture of the property is secured and a credit report on Mr. Jones is ordered by the 'Smith Company.' When the 'Smith Company' is in possession of the application, pictures and credit report, these are forwarded to 'Triple X Credit Corporation' of Philadelphia, which is actually the second mortgage lender . . . (Brief of the Attorney General in the Superior Court of New Jersey, Appellate Division, AG3a, paragraph 2)

The New Jersey Act established substantive protections for borrowers (N.J.S.A. 17:11A-21 through N.J.S.A. 17:11A-27). Licensing of lenders, brokers and dealers was

the vehicle chosen for policing the operations of secondary mortgage lenders (N.J.S.A. 17:11A-2 through N.J.S.A. 17:11A-20). The Act provides that no secondary mortgage loan made or negotiated in less than full compliance with its terms shall be enforceable in the courts of New Jersey (N.J.S.A. 17:11A-29).

While the Act does not expressly limit its protections to New Jersey residents, it is manifest that such was intended. The Appellate Division of the Superior Court of New Jersey so found, *Oxford Consumer Discount Company of North Philadelphia* v. *Stefanelli*, 102 N. J. Super. 549 (App. Div. 1968), affirmed as modified, 55 N. J. 489 (1970).

B. *The Proceedings Below*

The Superior Court of New Jersey, Law Division, granted summary judgment in favor of Oxford Consumer Discount Company of North Philadelphia (hereinafter "Oxford") against Anthony E. Stefanelli and Theresa A. Stefanelli (hereinafter "Stefanelli" or "Stefanellis"), appellees herein, in an action on a promissory note executed at the Philadelphia office of Oxford in purported conformity with Pennsylvania's Consumer Discount Company Act (*Purdon's Pa. Stat.*, §§ 6201 through 6219). At the same time, the trial court denied the appellees' cross motion for summary judgment made in reliance upon the New Jersey Secondary Mortgage Loan Act, N.J.S.A. 17:11A-1 through N.J.S.A. 17:11A-33, the terms of which were clearly violated by the transaction. Allegations of fraud and other defenses raised by the borrowers were never tried by reason of this summary disposition of the case. *Oxford Consumer Discount Company of North Philadelphia* v. *Stefanelli*, Superior Court of New Jersey, Law Division, Docket No. L-18411-66. The Stefanellis appealed to the Superior Court of New Jersey, Appellate Division.

The Appellate Division found that the New Jersey Secondary Mortgage Loan Act, N.J.S.A. 17:11A-1 through N.J.S.A. 17:11A-33, was intended by the New Jersey Legislature to apply to the Stefanelli transaction; that such application was constitutional and a valid exercise of the legislative power; and that the transaction violated the New Jersey Act in two undisputed particulars, namely the rate of interest charged to the borrowers and the inclusion in the loan documents of a warrant to confess judgment contrary to the proscriptions of N.J.S.A. 17:11A-21 and N.J.S.A. 17:11A-23. The judgment of the trial court was reversed upon the ground that the entire transtion was therefore unenforceable by virtue of N.J.S.A. 17:11A-29. *Id.*, 102 N. J. Super. 549. Following this decision, appellant First Mercantile Consumer Discount Company (hereinafter "First Mercantile"), which was then in litigation with appellees Paul and Ellen Durkin, et al. in a case involving similar legal issues, moved to intervene and be heard upon the question whether the decision of the Appellate Division in the *Stefanelli* case should be applied prospectively only. That litigation, which is still pending, was instituted by the Durkins and others as a class action against several defendants seeking a declaratory judgment as to the construction of the New Jersey Secondary Mortgage Loan Act, N.J.S.A. 17:11A-1 through N.J.S.A. 17:11A-33. The motion to intervene, together with a motion of the Attorney General of New Jersey for formal intervention as a party, was granted by order of the Appellate Division which also directed the appellees, Durkin to appear as *amicus curiae* to oppose the application of the appellant, First Mercantile. Upon review; after submission of briefs and argument, the Appellate Division, on February 24, 1969, rendered a decision limiting the effect of its original decision upon transactions which preceded the date of that original decision (September 11, 1968). *Oxford Consumer Discount Com-*

pany of North Philadelphia v. *Stefanelli*, 104 N. J. Super. 512 (App. Div. 1969). Thereafter the appellants, Oxford and First Mercantile appealed to the Supreme Court of New Jersey from the whole of the decision of the Appellate Division as originally rendered and subsequently modified. A majority of the Supreme Court affirmed for the reasons expressed by the Appellate Division but further limited the financial relief available to borrowers, including all of the parties in these cases, in connection with transactions entered into prior to the first decision of the Appellate Division. *Oxford Consumer Discount Company of North Philadelphia* v. *Stefanelli*, 55 N. J. 489 (1970). The *Stefanelli* case was remanded to the trial court for a plenary trial on the issue of intermediation by Pennsylvania lenders, through agents or otherwise, within New Jersey to solicit the Stefanelli loan, the determination of which will decide how much financial relief should be available to the Stefanellis as the result of the nonconformity of their transaction with the requirements of the New Jersey Act. This case is now pending before the Superior Court of New Jersey, Law Division.

ARGUMENT

POINT I

The judgment from which this appeal has been taken, lacks finality.

28 U.S.C.A. §1257, which grants jurisdiction to the Supreme Court to review decisions of the highest court of a state, requires that such decisions be "final judgments or decrees". *Montgomery Bldg. & Court-Trades Council* v. *Ledbetter Erection Co.*, 344 U. S. 178, 180 (1952). The decision of the New Jersey Supreme Court herein, from

which the appellants appeal, is not a final judgment or decree. See *Oxford Consumer Discount Co. of North Philadelphia* v. *Stefanelli*, 55 N. J. 489 (1970).

Because of the procedure adopted by the New Jersey courts below, the New Jersey Supreme Court decided in *Stefanelli, supra,* only the issue of applicability of New Jersey's Secondary Mortgage Loan Act [N.J.S.A. 17:11A-1 through N.J.S.A. 17:11A-33] to the type of transactions involved, without ultimately deciding the rights of the parties. By its intervention in *Stefanelli, supra,* First Mercantile, defendant in a class action by the appellees, Durkin, sought and obtained in effect a declaratory judgment as to the applicability of New Jersey Secondary Mortgage Loan Act to the class of borrowers purportedly represented by the Durkins. However, the decision of the New Jersey Supreme Court did not decide finally the rights and obligations between the parties, arising from the transactions between them. The New Jersey court held that hypothetical transactions which were entered into between the Pennsylvania lenders and New Jersey borrowers subsequent to September 11, 1968 were unenforceable in New Jersey, if they violated the provisions of the New Jersey Secondary Mortgage Loan Act, N.J.S.A. 17:11A-1 through N.J.S.A. 17:11A-33. As to transactions consummated prior to September 11, 1968, which includes the Stefanelli transaction, the case directly before the Court, and the Durkin transaction, the case indirectly before the Court, the issues were remanded for trial to determine whether or not there were solicitations of loans in New Jersey by an intermediary of the Pennsylvania lenders.

It is significant that there are no actual post September 11, 1968 transactions before the Court. Indeed, counsel for First Mercantile in the oral argument before the New Jersey Supreme Court stated that his client had

ceased making such loans after the Appellate Division decision on September 11, 1968. Thus, the "affirmance" by the New Jersey Supreme Court did not finally determine an actual case or controversy. The *Stefanelli* case has been remanded for further proceedings on the issue of New Jersey solicitation by intermediaries. That proceeding will resolve issues which will determine the rights of the appellant, Oxford and the appellees, Stefanelli. Without the prior determination of those issues, the decision of this Court in the pending appeal will not finally resolve the litigation between those parties.

If this Court affirms the New Jersey Supreme Court, the parties still will have to litigate the issues involving the use of New Jersey intermediaries by the appellants which were remanded by the New Jersey Supreme Court for trial. If this Court reverses the decision of the New Jersey Supreme Court, the parties still will have to litigate the issue as to whether the use of New Jersey intermediaries by the Pennsylvania lenders constitutes sufficient contact with New Jersey to afford it jurisdiction to impose its regulations on the transaction apart from the issues posed in this appeal.

Indeed, First Mercantile, the appellant herein in Docket No. 1688, has no direct interest in the outcome of the Oxford-Stefanelli controversy which is yet undetermined in the New Jersey courts. In the *Durkin-First Mercantile* case below, there is no determination at the trial level and an interlocutory appeal is pending in the Appellate Division of the New Jersey Superior Court to determine the propriety of an order denying First Mercantile's motion to dismiss on the ground that the suit by Durkin is not a proper class action under the New Jersey Rules of Civil Procedure. *Lindley Henry, Jr., et al.* v. *First Mercantile Consumer Discount Company*, Superior Court of New Jersey, Appellate Division, Docket No. A-164-68.

The requirement that the state court judgment from which the appeal is taken to this Court be "final" is a jurisdictional requirement of 28 U.S.C.A. §1257. Although there is no easy formula to determine finality, prior decisions of this Court have established the philosophy underlying the requirement of finality. In effect, this Court has refused to interfere with state court proceedings until the controversy there has been finally resolved. *Republic National Gas Co.* v. *Oklahoma*, 334 U. S. 62, 67-69 (1947); *Stern & Grassman, Supreme Court Practice* (1969), §3.7, p. 93.

Justice Frankfurther explained the requirement of "finality" as follows [*Republic Natural Gas Co.* v. *Oklahoma*, *supra*, 334 U. S. at 67-68]:

> "* * * Thus, the requirement of finality has not been met merely because the major issues in a case have been decided and only a few loose ends remain to be tied up—for example, where liability has been determined and all that needs to be adjudicated is the amount of damages. * * *"

It has been well established that 28 U.S.C.A. §1257 requires that the "final" judgment appealed to this Court be subject to no further review or correction by the state tribunal and must constitute an effective termination of the litigation between the parties. *Market Street R. Co.* v. *Railroad Com. of Cal.*, 324 U. S. 548 (1944).

The fact that the New Jersey Supreme Court used the term "affirmed" in approving in part the decision below is not significant. It is the effect of the decision which is determinative of the question of finality. *Gospel Army* v. *Los Angeles*, 331 U. S. 543, 548 (1946). In the case at bar, there is no finality in respect to the actual controversy between the parties. The New Jersey Court has

decided the applicability of the statute in question, but, in limiting the effect of that decision retrospectively, it has interjected a factual issue yet to be resolved, namely the solicitation or other use of intermediaries by the lenders in New Jersey. That crucial issue has been remanded to the trial division of the New Jersey Superior Court for determination within the limits of the state Supreme Courts decision. Obviously, the posture of the case as to these parties is interlocutory, and the issue of intermediation in New Jersey will have a significant constitutional impact on the application of the statute in question to the transaction of these parties.

While it appears that this Court has entertained jurisdiction over cases not completely resolved under its conception of separable and independent matters, *Hudson Distributors* v. *Eli Lilly & Co.*, 377 U. S. 386 (1964); *Mercantile National Bank* v. *Langdeau*, 371 U. S. 555 (1963); *Local No. 438 Construction & General Laborers Union* v. *Curry*, 371 U. S. 542 (1963), the circumstances in those cases were such that the decision of this Court would resolve the entire litigation or in some instances prevent irreparable harm to the litigants by resolving a crucial issue which would materially affect the conduct of the litigation and the rights of the parties pending its final determination.

In *Hudson Distributors* v. *Eli Lilly & Co.*, *supra*, for example, the Ohio Supreme Court had held the Ohio Fair Trade Act valid and not "in violation of the Constitution of the State of Ohio nor of the Constitution of the United States * * *". At the time of the appeal to this Court there were pending and unresolved in Ohio questions concerning the interpretation of the Ohio Act not made or considered by the Ohio courts nor raised by the facts of the case. Notwithstanding, this Court noted probable jurisdiction [*Hudson Distributors* v. *Eli Lilly &*

Co., 375 U. S. 939 (1963)] on the ground that the issues pending in the Ohio courts and subject to further proceedings were separate and independent matters which did not render the judgment under appeal non-final. *Supra* 377 U. S. at 389-390. It appears that the validity of the Ohio act was an issue capable of finally determining the litigation between the parties. In addition, the unresolved issues were collateral to the rights of the parties since they involved matters not raised by the facts in the case on appeal. In his dissenting opinion in *Hudson Distributors* v. *Eli Lilly & Co., supra,* 377 U. S. at 397, Justice Harlan argues persuasively for preserving the doctrine of "finality" as a prerequisite to this Court's review of state court decisions:

> "Although the distinction between final and non-final judgments, for purposes of this Court's jurisdiction, has been 'faint and faltering at times,' *Republic Natural Gas Co.* v. *Oklahoma*, 334 U. S. 62, 69, 92 L. ed. 1212, 1220, 68 S. Ct. 972, it has not disappeared altogether. The nature of the distinction and the reasons for maintaining it have repeatedly been stated. To be reviewed in this Court, a state court judgment must be 'final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.' *Market Street R. Co.* v. *Railroad Comm'n*, 324 U. S. 548, 551, 89 L. ed. 1171, 1176, 65 S. Ct. 770. It 'must end the litigation by fully determining the rights of the parties . . . .' *Gospel Army* v. *Los Angeles*, 331 U. S. 543, 546, 91 L. ed. 1662, 1665, 67 S. Ct. 1428."

And at 377 U. S. page 400, the Justice continued as follows:

> "In addition to making an uneconomic use of its own time, the Court's entertainment of these appeals has interfered with the orderly procedures of the Ohio courts. In its brief to this Court, Lilly states that proceedings in the Court of Common Pleas have been stayed 'pending the outcome of this appeal.' Brief, p. 11. Upjohn states in its brief that it has not yet taken action to bring to trial the issues reserved in its case. Brief, p. 13, presumably because of the pendency of the present proceedings. So far as the litigants are concerned, this march to the well for an eye-dropper of water does them no good either, except insofar as delay may be temporarily useful to one party or the other. Now that this Court's decision is rendered, the action will presumably go forward in the state courts; the litigants are no better informed of their ultimate rights than they were before the case came here, and the case is not a jot closer to its conclusion."

For the same reasons, it is respectfully submitted, that this appeal will determine little in respect to the actual controversy between the parties and should be dismissed for lack of finality in the judgment below. To do otherwise will only delay the ultimate determination of the rights of the parties; a delay which will permit the continued collection of disputed loans by the appellants pending the completion of this fruitless and time consuming expedition in pursuit of an abstract question of law.

POINT II

These appeals present no substantial federal question.

A. The interstate commerce clause of the United States Constitution, Article I, Section 8, is not violated by application of the New Jersey Secondary Mortgage Loan Act to the transaction here involved.

In *People* v. *Fairfax Family Fund, Inc.*, 235 Cal. App. 2d 881 (1965), appeal dismissed for want of a substantial federal question *sub nom. Fairfax Family Fund, Inc.* v. *California*, 328 U. S. 1 (1965). This Court had before it the question whether the State of California violated Article I, Section 8 of the *United States Constitution* by requiring that a Kentucky corporation be licensed under the *California Financial Code*, §§24200 through 24651, as a condition for doing a small loan business with Californians. In *Fairfax*, the Kentucky lender mailed printed matter to California residents soliciting business. The potential California borrower executed and returned to Kentucky a loan application and promissory note. The Fairfax Company secured a California independent contractor to conduct a local credit investigation. If the loan was approved in Kentucky, a check was mailed from there to the borrower who in turn made repayment of the loan to the Kentucky office of the Fairfax Company. Fairfax maintained no offices in California nor did any of its corporate officers reside there. Its impact upon the economy of California was clear, however, from the fact that it had $3,500,000 in outstanding loans to California residents. As the result of the failure of Fairfax to secure a small loan license in California, the commissioner of corporations of that state issued a restraining order enjoining it from continuing to conduct a small loan business with Californians. Fairfax appealed, contend-

ing that to require it to be licensed by the State of California would create an unconstitutional burden on interstate commerce. Both the California high court and this Court disagreed, the California court citing *California* v. *Thompson*, 313 U. S. 109 (1940); *Huron Portland Cement Co.* v. *Detroit*, 362 U. S. 440 (1960); *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945); *Union Brokerage Co.* v. *Jensen*, 322 U. S. 202 (1944); and *Eli Lilly & Co.* v. *Sav-On-Drugs*, 366 U. S. 276 (1961) among other authorities in support of its holding that California had the power to require licensing as a protective measure for its residents.

Examination of the California legislation makes it obvious that licensing in that state is more than a mere ministerial undertaking. The *Financial Code* of California, §§24200 through 24651, like the New Jersey Secondary Mortgage Loan Act, N.J.S.A. 17:11A-1 through N.J.S.A. 17:11A-33, provides for in-depth, continuous and thorough supervision of licensees.

Sections 24400 through 24414 of the California Act authorize detailed regulation by the commissioner of the conduct of the licensee's business (§§24402, 24403, 24404 regulate places of business; §§24406, 24407 and 24408 require that offices, books and records be accessible to the commissioner and that an annual report be filed).

Sections 24450 through 24457 of the California Act regulate loan terms and conditions and proscribe enforcement in California of loans not conformable therewith.

Sections 24600 through 24612 of the California Act provide for revocation or suspension of licenses and in this connection reiterate the power of the commissioner to inspect books and records as well as offices of licensees.

These provisions, applied to a Kentucky corporation doing a mail order business, were justified in *Fairfax*

because California owed a duty of protection to its citizens. In the present appeals, we are on no different ground. By dismissing the appeal in *Fairfax*, this Court has decided the interstate commerce argument raised by appellants herein in favor of the regulatory rights of New Jersey.

B. The due process clause of the Fourteenth Amendment of the United States Constitution is not violated by Application of the New Jersey Secondary Mortgage Loan Act to the transactions here involved.

The thrust of the appellants' due process argument is that, by applying the New Jersey Act, N.J.S.A. 17:11A-1 through N.J.S.A. 17:11A-33, to their transactions, New Jersey makes an unconstitutional extraterritorial application of its local law. Such argument rests upon the implied notion that traditional choice of law formulations (e.g. "place of execution" or "place of repayment" govern validity of a contract) always rise to the level of constitutional mandates. Clearly, however, such an assertion is inconsistent not only with the decision in the *Fairfax* case, *supra*, but with other cases as well. See, for example, *Hoopeston Canning Company* v. *Cullen*, 318 U. S. 313 (1942); *Osborn* v. *Ozlin*, 310 U. S. 53 (1940); *Robertson* v. *People of California*, 328 U. S. 440 (1946) in all of which the *decideratum* of constitutionality was the legitimate interest of the forum in the transaction under review.

The contacts of New Jersey with the transactions of the appellants herein are multiple. These lenders concede that they have more than $10,000,000 outstanding in secondary mortgage loans to New Jersey borrowers. This deep imposition upon the economy of New Jersey, with its effect on New Jersey borrowers and their mortgaged homesites in New Jersey, is a significant contact, justifying New Jersey regulation. In addition, the resources

for repayment are generally earned in New Jersey; borrower credit investigation takes place in New Jersey;* the mortgages taken as security for their loans are recorded by the appellants in New Jersey and the lien imposed perfected by New Jersey's administrative and judicial facilities; and ultimately it is the courts of New Jersey to which the lenders look for enforcement of their claims. These contacts taken together are of sufficient importance to entitle New Jersey, in pursuit of the protection of its citizens, to require licensing as a condition for doing business with New Jersey borrowers. There is no more "enforced domestication" in the appeals here presented than was present in the *Fairfax* case, wherein this Court found that the licensing requirements of California did not present a substantial federal question.

C. The Full Faith and Credit Clause of the United States Constitution, Article IV, Section 1, is not violated by application of the New Jersey Secondary Mortgage Loan Act to the transactions here involved.

The full faith and credit clause of the *United States Constitution*, does not require the courts of New Jersey to enforce a contract valid under nonforum law, if enforcement will subvert the strong public policy of the forum state. *Alaska Packers Ass'n.* v. *Industrial Accident Comm.*, 294 U. S. 532 (1935); *Klaxon Company* v. *Stentor Electric Manufacturing Company*, 313 U. S. 487 (1941); *Watson* v. *Employers Liability Insurance Corp., Ltd.*, 348 U. S. 66 (1954).

The judgment was reached by the New Jersey Legislature in 1965 that its legitimate concern for the protec-

* Oxford concedes that the Stefanelli loan was consummated within minutes of his first appearance at their Philadelphia office.

tion of New Jersey residents required an act of general application to all secondary mortgage contracts made by them involving their homes in New Jersey. A substantial number of New Jersey residents were jeopardized by the abuses which were reported to the Legislature and which gave rise to its Act. These abuses had a palpably deleterious effect upon the economic safety and well being of New Jersey and its citizenry. New Jersey institutions, agencies and facilities were being utilized to further the process of intimidation, and Pennsylvania lenders, using their out-of-state status as a protective shield, were among the prime offenders. By its enactment, the New Jersey Legislature announced its resolve to equalize the bargaining positions of lender and borrower by direct local supervision of all such transactions in the interest of its residents to whom it owed a duty of protection. Under the New Jersey Act, all licensees are subject to the same kind and degree of regulation and all secondary mortgage loan transactions with New Jersey residents involving New Jersey real estate are subject to the same limitations and restrictions. A departure from this regulatory design would indeed violate the strong public policy of New Jersey which dictates an even-handed, active and thorough supervision of lenders engaged in such business with New Jersey residents. To the extent that New Jersey is unable to license it is unable to regulate. To the extent that it is unable to regulate, its strong public policy of protecting its citizens is, in the most fundamental sense, subverted.

By choosing to enforce its own law, rather than Pennsylvania law, in its own courts, New Jersey acts squarely within the authority of *Fairfax* and well within constitutional limits.

CONCLUSION

Appellees respectfully submit that the appellants' appeals are premature because no final judgment has been rendered by the highest court of New Jersey, and further, that the issues raised by the appellants present no substantial federal question. Therefore, these appeals should be dismissed, or the judgment below affirmed.

Respectfully submitted,

ANNAMAY T. SHEPPARD,
Attorney for Anthony E. Stefanelli and Theresa A. Stefanelli, Appellees,
Newark Legal Services Project,
449 Central Avenue,
Newark, New Jersey, 07102,

and

JACK B. KIRSTEN,
KIRSTEN, SOLOMON & FRIEDMAN,
Attorneys for Paul V. Durkin and Ellen Durkin, Appellees,
744 Broad Street,
Newark, New Jersey, 07102.

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